



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 7, 2003

Ms. Marianna M. McGowan
Abernathy, Roeder, Boyd, & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2003-4668

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183794.

The Collin County Community College District (the "district"), which you represent, received a request for performance and student evaluations of two named instructors and additional information relating to one of the instructors. The requestor later made an additional request for "all formal disciplinary action taken against current members of the faculty and faculty members who have left the college in the past 12 months." You have informed the requestor that "any documents that might have been created during the [mediation] process were destroyed by the mediator." See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received or to create new information in response to request). You state that you have released some information to the requestor but claim that other requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the district denied the requestor access to a portion of the requested information on the basis that it had entered into a confidentiality agreement with one of the named instructors. Information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open

Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”); *see also Industrial Found.*, 540 S.W.2d at 677 (governmental agency may not bring information within exception by promulgation of rule; to imply such authority would be to allow agency to circumvent very purpose of predecessor to Act). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We next note that Exhibits E and F consist almost entirely of completed performance and student evaluations, which are subject to section 552.022 of the Government Code. This section provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” is public and may not be withheld unless it is expressly confidential under other law or excepted from disclosure by section 552.108. Gov’t Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. You claim that this information may be withheld under section 552.103. This section is a discretionary exception and is not “other law” for the purpose of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore the evaluations may not be withheld on the basis of section 552.103. However, you also assert that portions of the evaluations are excepted under sections 552.026, 552.101, and 552.114, and we will address those arguments.

Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 (“FERPA”).¹ Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that “information contained in education records of an educational agency or institution” may only be released under the Public Information Act in accordance with FERPA.

¹Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section incorporates confidentiality provisions such as FERPA into the Public Information Act.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." See Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. See Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). We have marked a sample of the type of information that must be redacted from the student evaluations pursuant to section 552.114 as well as FERPA. Because you have claimed no other exceptions for the performance evaluations or the remaining information in the student evaluations and they are not otherwise confidential by law, they must be released.

We turn now to your claim regarding section 552.103 for the remaining information. This section provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212

(Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

You assert that the district anticipates litigation by one of the named instructors and that the requested information relates to that anticipated litigation. You have submitted information to this office showing that the instructor has filed a complaint with the Texas Commission on Human Rights (the "TCHR") alleging discrimination and indicate that the complaint was still pending when the district received this request.² Based on the information you have provided, we conclude that you have shown that the district reasonably anticipated litigation at the time it received this request. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC complaint indicates litigation is reasonably anticipated). In addition, our review of the remaining information shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, with the exception of the completed performance evaluations and the remaining information in the student evaluations, you have demonstrated the applicability of section 552.103 to the requested information.

We note, however, that once information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). In this instance, Exhibit H is a letter addressed to the instructor who filed the TCHR complaint and concerning the dispute at issue. This individual is apparently the only potential opposing party in the anticipated lawsuit regarding his complaint. Therefore this document may not be withheld pursuant to section 552.103. Thus, until such time as the anticipated litigation has concluded or is no longer reasonably anticipated, pursuant to section 552.103, you may withhold Exhibits G and I and the two documents in Exhibit F that do not constitute completed evaluations. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982) (concluding that applicability of litigation exception ends when litigation is concluded).

We note, however, that the letter addressed to the potential opposing party includes information that may be excepted from disclosure under section 552.117. Section 552.117(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(1), the district must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of any

²The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

individual who elected, prior to the receipt of this request, to keep such information confidential. As for the remainder of the letter, because you have claimed no other exception for it and it is not otherwise confidential by law, it must be released.

In summary, we have indicated the types of information that must be redacted from the student evaluations pursuant to section 552.114 and FERPA. The district may withhold Exhibits G and I and the two marked documents in Exhibit F pursuant to section 552.103 until the anticipated litigation has concluded. Information subject to section 552.117 must be withheld to the extent that the employee at issue made a timely election to keep such information confidential. All other submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

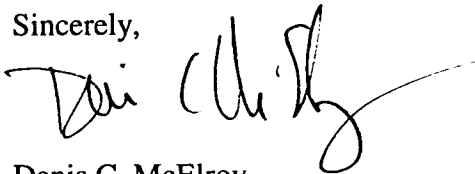
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/sdk

Ref: ID# 183794

Enc. Submitted documents

c: Mr. Paul David Meyer
Plano Star Courier
c/o Ms. Marianna M. McGowan
Abernathy, Roeder, Boyd, & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210
(w/o enclosures)